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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

KIMBERLY ALLEN, Personal Representative of the Estate of TODD ALLEN, Individually, on behalf of the Estate of TODD ALLEN, and on behalf of the Minor Child, PRESLEY GRACE ALLEN,)	
)	Case No. 3:04-CV-0131-JKS
)	
)	REPLY TO UNITED STATES' OPPOSITION
)	TO PLAINTIFF'S MOTION IN LIMINE TO
)	LIMIT DEFENDANT'S EXPERTS TO
)	ONLY TESTIFY WITHIN THE SCOPE OF
Plaintiff,)	THEIR EXPERTISE
)	
vs.)	
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Mrs. Allen filed a motion requesting that this court limit the testimony of two of defendant's experts, Dr. Levy, an emergency room physician, and Dr. Rubenstein, a neurologist from California. The government opposes plaintiff's motion.

1 **A. DR. LEVY**

2 Mrs. Allen, based on discovery and the disclosures made to her to date regarding
3 Dr. Levy, does not argue that Dr. Levy is not qualified to render opinions regarding the
4 applicable standard of care owed a patient, such as Mr. Allen, presenting at a hospital
5 emergency department. Similarly, the plaintiff acknowledges, based on discovery and
6 disclosures to date, that Dr. Levy has knowledge and experience regarding medevac
7 procedures involving Alaska Regional Hospital. Plaintiff objects to Dr. Levy testifying about
8 causation in this case. As explained in Plaintiff's motion, Dr. Levy testified unequivocally at
9 his deposition that he was not a neurosurgeon, nor did he claim to have some expertise in that
10 area.¹

11 Dr. Levy specifically stated under oath that he "cannot render an opinion, as an expert,
12 on the actual outcome of this case and how the initial care would have impacted that." When
13 asked, "[a]nd that is because of your – that's outside your area of expertise," he answered
14 "[y]es." Exhibit 2 at 53.

15
16
17 ¹ Dr. Levy was asked, "okay, but you don't consider yourself to – given that experience,
18 to have some expertise in neurosurgery, or do ..." Dr. Levy responded, "absolutely not."
19 Exhibit 2 at 57. He admitted that he was not qualified to say how long it would take to develop
20 the brain edema that was seen on Mr. Allen's CT scan after he was taken by ambulance to
21 Providence late in the day on April 19th. *Id.* at 175. He admitted he was not qualified to
render an opinion about whether or not Mr. Allen's brain had been bleeding throughout the day
he presented to the Alaska Native Medical Center or bled once. *Id.* at 174-175.

1 The government in its opposition does not respond to the plaintiff's argument that
2 Dr. Levy is not qualified to testify about how the "initial care" of Todd Allen, or the lack
3 thereof, "impacted" Mr. Allen's outcome. Dr. Levy should be precluded from offering
4 opinions about Mr. Allen's likely outcome had his subarachnoid bleed been diagnosed and
5 treated because, according to his own testimony, he is unqualified to offer such opinions.

6 The government claims that Dr. Levy is "entitled to rely on his prior knowledge and on
7 other information he obtained that in 2003 there were only three neurosurgeons in Alaska and
8 that they did not perform emergency surgery for patients with aneurysm, such as Allen."
9 Defendant's Opposition at 5-6. However, Dr. Levy testified that he did not "know if this
10 particular time, when [Allen] presented, was that time" when the Anchorage neurosurgeons
11 would not do aneurysm surgeries. Exhibit A to Defendant's Opp. at 190-193. Dr. Levy is not
12 entitled to testify as to his speculation about when it might have been that neurosurgeons in
13 Anchorage were not performing surgery on aneurysms. This is not the type of expert opinion
14 that should be allowed at a trial.

15 Finally, the issue in this case is whether or not the United States met the standard of care
16 in its evaluation and treatment of Mr. Allen on April 19, 2003 in the Emergency Department of
17 the Alaska Native Medical Center ("ANMC"). The United States owed the same standard of
18 care to Mr. Allen whether or not he was seen by an emergency room physician or a "mid-level
19 practitioner." What the United States is attempting to do is to create two different standards of
20 care – one for those who present at an emergency department who are triaged to a nurse
21 practitioner and one for those triaged to an emergency room physician. It then seeks to have its

1 emergency medicine expert (and its neurologist) testify as to the standard of care for its nurse
 2 practitioner. There is but one standard of care that applies and Dr. Levy may be qualified to
 3 testify regarding the standard of care owed a patient presenting to a hospital emergency
 4 department. If the government is going to persist that there are two different standards of care
 5 that apply to patients presenting at ANMC's Emergency Department, then the plaintiff objects
 6 to Dr. Levy being able to testify regarding the standard of care that applies to a mid-level
 7 practitioner, especially when he admits that he is not particularly familiar with their training.²

8 **B. DR. RICHARD RUBENSTEIN**

9 As a matter of clarification, the government's contention, Opp. at 4, that Dr. Rubenstein
 10 "is a neurologist with subspecialties in electrophysiology, traumatic brain injuries, and
 11 cognitive neurology" is simply incorrect. While Dr. Rubenstein may have a professed interest
 12 in traumatic brain injuries and cognitive neurology, he does not have subspecialties in those
 13 areas. See Defendant's Exhibit C at 14-15; see Exhibit 3 (Exhibit 3 to Dr. Rubenstein's
 14 deposition which is attached to this Reply).

15 More importantly, the government contends in its opposition, essentially without
 16 support or reason, that Dr. Rubenstein should be allowed to offer expert opinions about the
 17 standard of care owed by the ANMC Emergency Department to a patient, such as Mr. Allen,
 18

19 ² Exhibit 2 at 53-54. Certainly, a neurologist with a clinical practice who has not
 20 performed hospital work in ten years should not be allowed to opine on the standard of care
 21 that applies to a nurse working in an emergency department, assuming there is a separate
 standard of care for nurses providing emergency department services as opposed to a
 physician.

1 presenting in April 2003, and whether or not that standard of care was breached in this case.
2 Emergency medicine is a specialized area of medicine with its own board certification.
3 Physicians who practice emergency medicine are required, among other things, to complete a
4 residency in emergency medicine. Dr. Rubenstein has no such training. Exhibit C to
5 Defendant's Opp. at 34-36. Furthermore, whether or not he provided neurological services to
6 patients in an emergency room setting between 1978 and 1997, he is not qualified to testify
7 about the standard of care governing emergency room medicine in 2003.

8 The government further claims that Dr. Rubenstein is qualified to talk about the
9 availability of neurosurgical services in Anchorage in 2003 and the logistics of treating patients
10 with subarachnoid hemorrhages in Anchorage in 2003 when he has no familiarity with the
11 practice of medicine in Anchorage, with ANMC policies and procedures or with the
12 neurosurgical services available in Anchorage in 2003. While Dr. Rubenstein may rely to
13 some extent on another expert's opinions, he may not rely on the speculation of other experts
14 and he may not rely on information told to him by defense counsel. Dr. Rubenstein testified at
15 this deposition that, "I've reviewed in detail all the medical records. I have looked at Dr.
16 Levy's report. *I have talked to Mr. Guarino about what the logistics were in Anchorage, and,*
17 *you know, that there are three neurosurgeons in the state.* It's not clear to me whatsoever that
18 either Godursky [sic], or Craelic [sic] or Cohen were doing aneurysm surgery on 4-19-03 in
19 Anchorage." (Emphasis added). Exhibit C to Defendant's Opp. at 183. Dr. Rubenstein never
20 spoke with any of the Anchorage neurosurgeons. *Id.* at 185. It was likely not clear to Dr.
21 Rubenstein whether or not the Anchorage neurosurgeons were performing surgeries on patients

1 with aneurysms in April 2003 because Dr. Levy was not able to obtain this information.
2 Exhibit 2 at 190-191.

3 The cases cited by the government, *Sullivan v. United States*, 365 F.3d 827 (9th Cir.
4 2004) and *United States v. Sandoval-Mendoza*, 472 F.3d 645 (9th Cir. 2006), do not support its
5 position that Drs. Levy and Rubenstein may provide expert testimony on issues not within their
6 expertise. In *Sullivan*, the Ninth Circuit reversed the district court's order granting the United
7 States' motion for summary judgment, holding that the district court erred in its analysis
8 regarding whether or not the testimony of plaintiff's expert would be admissible. 365 F.3d at
9 834. In that case, which involved allegations that agents of the United States negligently
10 performed a mastectomy and reconstructive breast surgery leading to infection, severe scarring
11 and pain, the plaintiff's expert surgeon who was an oncologist and reconstruction oncologist,
12 who had performed mastectomies and reconstructive breast surgeries, offered the opinion that
13 a cause of the plaintiff's infection and subsequent injuries was the fact that the surgery took
14 more than three times longer than it should have, and prolonged surgeries increase the risk of
15 infection. *Id.* at 830-831. The appellate court noted that the district court erred in applying too
16 strict a standard to the plaintiff's expert's testimony – not because the trial court considered the
17 expert to be testifying outside of her field, but because it required the medical literature she
18 relied on to “state the precise type of harm explained by the specialized testimony of [the]
19 medical expert.” *Id.* at 833-834. This was not a case where a medical expert was offering
20 testimony that was clearly outside of her area of training, experience and expertise and that she
21 admitted was outside of her area of training, experience and expertise.

1 In *Sandoval-Mendoza*, a criminal case involving the defense of entrapment, the
 2 defendant sought to offer the testimony of a neuropsychologist and neurologist³ that brain
 3 damage caused by a brain tumor affected the defendant's susceptibility to inducement. The
 4 Ninth Circuit, reversing the defendant's conviction, held, among other things that the trial court
 5 abused its discretion when it excluded the defendant's experts from testifying at trial. The
 6 appellate court noted that the trial court's analysis requiring the expert testimony to
 7 "conclusively prove Sandoval-Mendoza's brain tumor caused susceptibility to inducement or a
 8 lack of predisposition" was in error. 472 F.3d at 655. As explained by the appellate court,

9 medical knowledge is often uncertain. The human body is complex, etiology is
 10 often uncertain, and ethical concerns often prevent double-blind studies
 11 calculated to establish statistical proof. This does not preclude the introduction of
 medical expert opinion testimony when medical knowledge "permits the assertion
 of a reasonable opinion."

12 *Id.* The issue in *Sandoval-Mendoza*, therefore, was not whether or not the defense experts
 13 were testifying outside of their area of expertise or beyond their qualifications or experience, it
 14 was whether or not the data they relied upon lacked scientific validity. Using the Appellate
 15 Court's analysis in *Sandoval-Mendoza* in Mrs. Allen's motion, the question is: would a
 16 physician board certified in emergency medicine find the testimony of a neurologist who had
 17 not worked in a hospital emergency room setting for 10 years useful and reliable in
 18 establishing the standard of care owed a patient in an emergency room. Likewise, would a
 19 neurosurgeon find the testimony of an emergency room physician who typically does not

21 ³ The government's experts were a neuropsychologist and neurologist as well. 472 F.3d
 at 652.

1 follow patients beyond providing emergency services useful and reliable in proving the likely
2 outcome of a patient with a brain bleed. 472 F.3d at 655.

3
4 **C. CONCLUSION**

5 There should be reasonable limits set on the testimony of the government's expert
6 witnesses in that they should not be allowed to speculate and pontificate on subjects outside of
7 their areas of expertise.

8 **FRIEDMAN RUBIN & WHITE**
9 Counsel for Plaintiffs

10 DATED: March 14, 2007

By: /s/ Donna J. McCready

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17 **CERTIFICATE OF SERVICE**

18 I certify that on the 14th day of March 2007, a copy of the foregoing Reply to United States' Opposition
19 to Plaintiff's Motion in Limine to Limit Defendant's Experts to Only Testify Within the Scope of Their
20 Expertise was served electronically on:

21 Gary M. Guarino
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/s/ Donna J. McCready

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